Supreme Court of the United States.

OCTOBER TERM, A. D. 1902.

No. 174.

CLINTON B. WISER, C. M. FIELD, JOHN A. KERR, JAMES A. FERGUSON, DORSEY NEVILLE, MARY M. HEATH, JOHN J. MILLER, HENRY L. MUGSFORD, WILLIAM J. FOSTER, EDGAR G. MILLER, L. F. HOIRNE, SIDNEY G. LAW, EDWARD M. SMITH, HARPER M. SMITH, BENJAMIN GOODMAN, LESTER M. CROUCH, JOHN B. CLUTE, KATIE T. COURTNEY, H. S. ANDERS, AND CECIL QUENTIN, APPELLANTS,

vs.

JOHN LAWLER, ED. W. WELLS, SEVEN STARS GOLD MINING COMPANY, INDUSTRIAL MINING AND GUARANTY COMPANY, AND JOHN GRIFFIN, RECEIVER, APPELLEES.

REPLY BRIEF SUBMITTED FOR APPELLANTS.

MAY IT PLEASE THIS HONORABLE COURT:

The brief for appellees was not filed until Saturday, February 20, and we did not obtain a copy until the following Monday We propose now to reply to the contentions of

the learned counsel, and at the same time point out specifically the findings bearing upon the inquiries made by members of the court during the progress of oral argument.

The basic proposition upon which counsel rest the defense of Lawler and Wells is that the findings do not affirmatively show they knew that the moneys of appellants received by them had been obtained by false representations.

To this proposition we reply :

1. *The burden was upon appellees Lawler and Wells* to show they received the funds of appellants without any notice of the fraud, or of circumstances suggestive of inquiry to an ordinarily prudent and conscientious mind, and in the absence of an affirmative finding of want of notice, actual and imputable, appellees cannot retain the moneys out of which appellants were defrauded.

2. The true import of the findings, taken as a whole, is that Lawler and Wells had actual knowledge of the representation of ownership of the mines by the Seven Stars Gold Mining Company.

I.

The learned counsel for appellees erroneously assumed, as did the supreme court of Arizona (see opinion, Trans., 290), that the prayer for the money decree proceeded upon the same grounds and required the same proofs as the prayer for title. On the contrary, *the rule is settled that where money or property obtained by fraud passes into the hands of a third person, he cannot retain it without showing its receipt in due*

course of business, for a valuable consideration, and without any notice of the fraud.

Bigelow on Fraud, vol. 1, p. 494.
Miller *vs.* Fraley, 21 Ark., 35.
Haskins *vs.* Warren, 115 Mass., 514.
Chaffin *vs.* Heirs of Kimball, 23 Ill., 36.
Campbell *vs.* Whitson, 68 Ill., 240.
Brown *vs.* Fitch, 43 Conn., 512.
Throckmorton *vs.* Rider, 42 Iowa, 84.
Perry on Trusts, sec. 219.

This rule is manifestly just and reasonable, and necessary for the relief of those defrauded.

The law places no great burden upon one who receives the fruits of a fraud in requiring him to show that he acted without any knowledge and gave value.

This honorable court has frequently decided that where a note is shown to have been fraudulently put into circulation, the burden shifts to the holder to show he received it before maturity, without notice, and for a valuable consideration.

Thompson *vs.* Bank, 150 U. S., 237.
Stewart *vs.* Lansing, 104 U. S., 509.

And this doctrine universally prevails.

Smith *vs.* Livingston, 111 Mass., 342.
Gordon T. Co. *vs.* Abbott, 44 N. J. Law, 257.
Randolph on Commercial Paper, vol. 2, sec. 1026.
L., N., A. and C. R'y Co. *vs.* Ohio, etc., 57 Fed., 42.
Shain *vs.* Goodwin, 46 Fed., 564.
Merchants' Bank *vs.* Brunswick, 33 N. J. Law, 170.

In cases like that at bar equity requires the most positive and specific denial and disproof of knowledge.

Perry on Trusts, sec. 219, and cases cited.

Story on Equity Juris., sec. 400.

The rule is stated by the learned counsel in his brief, page 25:

"Where a special finding is silent upon a material fact, it is deemed a finding as to that fact against the party who has the burden of proof."

II.

The learned counsel for appellees contends in his printed and oral arguments that it is impossible to trace the moneys of these appellants to Lawler and Wells. Counsel offered no criticism of the many authorities cited in our former brief, which we believe are applicable to the facts here found, and which announce the now clearly established doctrine in equity that where an agent receives funds of his principal and mingles them with his own, and then draws from the common fund, withdrawals for his own use will be attributed to his funds, and withdrawals in behalf of his principal attributed to the funds of his principal.

Here the Industrial Company was the agent of the Seven Stars Gold Mining Company to sell its stock, receive the proceeds and expend them as such agent in behalf of its principal (Find. 40). It received such funds, it deposited them in a bank account with funds derived from other sources and which it was using in connection with other enterprises, and from this common fund it paid out in behalf

of its principal, the Seven Stars Gold Mining Company, the payments made to Lawler and Wells, and these payments, when received by Lawler and Wells, were credited to the Seven Stars Gold Mining Company (Find. 30). It is clear that the Industrial Mining and Guaranty Company had no authority as the agent of the Seven Stars Gold Mining Company to use the funds derived from its stockholders, except in this particular transaction with Lawler and Wells. *It does not appear that such funds were used for any other purpose. It does not appear that after October* 1, 1892, *any funds other than those of the Seven Stars Gold Mining Company were used in paying Lawler and Wells.* It must be assumed that the intention was to use the funds of the Seven Stars Gold Mining Company in making the disbursements in its business.

Perry on Trusts, sec. 841.

We also beg to cite recent cases which directly refute the contention of counsel.

Pearce *vs.* Dill, 149 Ind., 142.

Blair *vs.* Hill, 165 N. Y., 672.

Smith *vs.* Combs, 49 N. J. Eq., 420.

But counsel say that the Industrial Mining and Guaranty Company paid out of this transaction more than it received from the stockholders. If this were true it would be no answer to our contentions, because to the extent that the moneys of appellants were used they could be recovered (Perry on Trusts, secs. 831, 842). But the findings do not bear out the claim of counsel. It is found that the Industrial Mining and Guaranty Company expended *in behalf of the Seven Stars Gold Mining Company*, in the operation of the property

and for improvements, supplies, and machinery $112,411.32 (Find. 58), and that the Industrial Mining and Guaranty Company paid to Lawler and Wells, in behalf of the Seven Stars Gold Mining Company, $112,399.96 (Find. 47). It further appears that they paid out as dividends $11,533.07 (Find. 60). These sums aggregate $236,344.35. This is the entire amount which the record shows that the Industrial Co. expended in this transaction *while acting as agent of the Seven Stars Co.* The amount received from the sale of stock by the Industrial Mining and Guaranty Company was $252,308.97 from guaranteed stock and $2,583.80 from common stock (finding 54, Transcript, 366). Thus it appears that the amount received from appellants was $18,448.42 more than the amount expended by the Industrial Company in the operation of the property and in remittances to Lawler and Wells.

Counsel argued at the bar that it was impossible to distinguish between the moneys paid direct to Lawler and Wells and the moneys expended in operating the property. It is unnecessary to so distinguish. It is clear that Lawler and Wells should repay the amount which they received direct from the Industrial Company, namely, $112,399.96 (finding 47), and the amount which they received from the Seven Stars Gold Mining Company, namely, $47,812.25 (finding 46), as the result of its operation of the property while the funds of the appellants were being used in defraying the total expense of such operation.

The findings are explicitly to the effect that from the moment sales of stock began it was the money of appellants that was being used in this transaction.

The court finds on May 20, 1893, Lawler received notice

in writing that remittances on account of the Cowland contract were being made from money derived from the sale of the stock of the Seven Stars Gold Mining Company (Find. 26). The ingenious effort of counsel to evade the effect of this finding did not, we believe, impress the court. It is a plain statement that remittances were being made to Lawler and Wells from money derived from the sale of stock of the Seven Stars Gold Mining Company, and that Lawler at this time received "notice in writing" to that effect.

But elsewhere the court finds that the Seven Stars Gold Mining Company had "no source of income other than the sale of its stock" (finding 28, Transcript, 321), and at another point it is found that all remittances to Lawler and Wells after November 1, 1892, "were placed to the credit of the Seven Stars Gold Mining Company" (Find. 30). The finding that the only funds that went into the treasury of the Seven Stars Gold Mining Company were derived from the sale of stock, coupled with the finding that out of its treasury $112,399.96 were paid to Lawler and Wells, are equivalent to the direct finding that that sum of $112,399.96 was paid Lawler and Wells from the moneys of these appellants. The same is true as to the $112,411.32 paid for operating the property by the Seven Stars Gold Mining Co.

But counsel made the assertion in oral argument that the record shows that after May 20, 1893, the Industrial Company borrowed $43,700 *and used it in this transaction.* There is no basis in the findings for such an assertion. It is true that the court did find that after May 11, 1893, the Industrial Mining and Guaranty Company borrowed that sum

of money (Find. 49), but it does not find that any part of that money was received by the Seven Stars Gold Mining Company or used in the business of the Seven Stars Gold Mining Company; but, on the contrary, such a construction is negatived by the express finding that the Seven Stars Gold Mining Company had no source of income other than the sale of its stock.

Furthermore, as we have seen, the legal presumption is that the Industrial Company, as agent, having received $252,308.97 belonging to its principal, used the funds of its principal in making the disbursements in the business of the principal.

Counsel failed to observe that from May 20, 1893, up to the date of the forfeiture, namely, September 10, 1893, the Industrial Mining and Guaranty Company, as the agent of the Seven Stars Gold Mining Company, was defraying the entire expense of the operation of the mines, and that this was being done while John Lawler was the superintendent of the property. Having no other source of income other than the sale of its stock, necessarily the expenses of that operation were met from that source, and Lawler was therefore using the funds of these appellants, *and knowingly using the funds of these appellants*, to operate the mines during this period, and he and Wells were receiving the proceeds. On June 6, 1893, Lawler and Wells received from this source $2,355.37.

Counsel reiterate in argument that Warner was a man of wealth, and upon him Lawler and Wells always relied for their payments. There is no finding touching the wealth of Warner, but the record does show that during the progress of this transaction he made an assignment for the ben-

efit of his creditors. It further shows that Warner did not pay a dollar to Lawler and Wells after May 24, 1892 (finding 47, transcript, 324). On the contrary, the plain facts are that Warner told Lawler and Wells at the inception of the transaction (finding 6) of his purpose to organize this corporation, and they were fully advised of its organization (finding 20) and of the public promotion of the property (finding 37), and it was from the sale of stock and from no other source (finding 28) that all payments to Lawler and Wells during a period of nearly a year were being made, and all these payments were placed to the credit of the Seven Stars Gold Mining Company (finding 30). It also appears that when Warner asked Lawler and Wells for the first extension (finding 21) he suggested "*that he was unable to place securities*," as the findings word it, in time to meet that portion of the purchase price falling due November 12, 1892 (finding 21), and the second extension was granted after Warner had become utterly unable to pay anything (finding 23). At that critical time Lawler took a hand in the business as manager, and, being manager, they elected him *a* director, and he and Wells stipulated that payments could be made for a certain time in monthly installments of $4,500 (finding 23), but the panic of 1893 being on, sales of stock stopped, and even these small monthly payments were impossible, and Lawler as manager, attempting to operate the property, and he and Wells as vendors, looked in vain to the empty treasury of the Seven Stars Gold Mining Company.

Some time before an official of the Seven Stars Gold Mining Company wrote Lawler (this being letter referred to by Mr. Scarritt in oral argument and the basis of finding 26) that he had left no stone unturned to raise money to cancel

the obligations of the Cowland contract, but he was handicapped by the stringency in the money market, which had made "his efforts to place the stock of the Seven Stars Gold Mining Company very difficult."

III.

As suggested in oral argument, finding 26 was made by the supreme court of Arizona after it had decided the case, as well as findings 27, 28, and the second paragraph in finding 30, and that therefore the decision of that court rests upon a false premise.

The supreme court of Arizona in its opinion does not discuss this distinct prayer of the appellants for a money decree upon the theory of a constructive trust. After disposing of the claim of an estoppel, the court said:

"The disposition of the questions above determined will render unnecessary a consideration of the third and fourth assignments, as they refer simply to the alternate prayer for relief in the complaint based upon the same allegations of fraud and misrepresentation upon which the error alleged in the first assignment was predicated."

This confusion of the grounds for a money decree with the grounds upon which we assert an estoppel, and the denial of one because the other is denied, is, as we have seen, manifestly fallacious.

IV.

In view of the pointed inquiries of the court during oral argument, we deem it important to call to the attention of your honors the late case of Holly *vs.* Missionary Society, 180 U. S., 284—opinion by Mr. Justice Shiras.

The language of that opinion is in complete harmony with the authorities we have cited, that the burden is upon him who asserts the right to retain funds gotten by another through fraud or felony to show he received them for value and without notice; but that case goes further and, in accordance with the rule announced in Perry on Trusts, section 219, holds that that burden can be met only by showing (1) absence of actual knowledge, and (2) absence of circumstances that would suggest to an ordinarily prudent man inquiry as to the source of the funds.

It is sufficient to destroy the defense that the party receiving the funds "had reason to believe" (page 289) that they had been obtained by fraud. If the party received the funds "in circumstances that visited him with notice," it is enough. In that case the defendant had no knowledge whatsoever of the transactions in which the fraud was committed (page 291), and relief was denied because the court was able to affirmatively find he "acted without any notice or knowledge, actual or imputable."

This honorable court has also held that before the party can retain the funds he must show he gave credit on the faith of them.

Wilson *vs.* Smith, 3 How., 763.

See also:

U. S. *vs.* State Bank, 96 U. S., 30.

It is difficult to see how appellees gave credit on the faith of the funds of appellants. The option was granted May 12, 1892.

V.

But the contention of the learned counsel that this record does not affirmatively show that Lawler and Wells knew the contents of the prospectus distributed in America or of the map distributed in America and England is not in accord with a reasonable interpretation of the findings.

We shall answer this contention upon the hypothesis that the burden was upon appellants to show knowledge.

We do not understand that this court is bound by the interpretation which the supreme court of Arizona gave in its opinion to the findings of fact. The findings, with the exception of four, as heretofore suggested, were made by the district court and adopted by the supreme court, and that court, we believe, erred not only in misapplying the law, but in misinterpreting the plain wording of the findings of fact. This honorable court will consider and interpret the findings irrespective of the opinion of the supreme court of Arizona, and will give to the findings of record not a narrow, literal, or technical construction, but the fair and reasonable interpretation and the meaning and scope to which, after a thorough consideration in the light of the entire record, they may seem entitled.

In this cause, especially, we submit that the findings should not be given a strict construction as against appellants, *because they were drafted and proffered by appellees.* The court will observe from the record that every finding suggested by appellants was rejected (Trans., 207–221).

Finding 20 is that John Lawler was in the office of the Industrial Mining and Guaranty Company on August 30, 1892,

and on September 3, 1892, and between those days, and that while there he became aware that there was in course of preparation a prospectus based upon the property of himself and Wells, and describing that property, and that the reports, milling and smelting returns, and other data furnished by himself and Wells were going into the prospectus.

In absence of any other finding, we contend that the plain import of these words is that Lawler then learned the contents of the document that was to be distributed as a prospectus. The court explicitly says that he personally knew the facts and statements furnished by himself and Wells were a part of the proposed prospectus, and certainly he could not know this much and be in ignorance of the contents. It will be perceived from an examination of the prospectus that the facts and statements mentioned in this finding appear in all parts of the prospectus, and, together with the assertions of ownership and advantages of investment, constitute the entire prospectus. How Lawler obtained his knowledge the finding does not disclose. It is not found that some one told Lawler that "the facts and statements" were being used for the purpose of a prospectus. It says he *became aware*—he personally learned that fact while there in the office, where and while the work was being done. The ultimate and essential fact is that Lawler did obtain this actual and personal knowledge, and the natural and ordinary means of obtaining it was to read or hear read the manuscript for the prospectus. A finding that a person had personal and actual knowledge that certain "facts and statements" which appear at every point in a certain document

were in that document is clearly equivalent to a direct finding that he knew its contents.

But further note the language of finding 20. It says that Lawler, while there in the office of the company, became aware that the facts and statements furnished by himself and Wells were "*being used*" in the preparation of the prospectus. Thus he was present when the actual work of preparing the prospectus was being done, and he knew what was being done in preparing it—that is, in arranging and determining its contents, and not a part, but all of its contents. He could not know less than this and still have actual, personal knowledge that the facts and statements furnished by him as used in this prospectus as it appears in this record were so used. Lawler could not have seen even the caption of the document (Transcript, 18) without knowing that the public were to be invited to purchase stock in the Seven Stars Gold Mining Company upon the basis of its ownership of his property.

But let us pass now to finding 37. It reads that Lawler and Wells, "in the month of October, 1892, became aware that *the American prospectus, Exhibit D*, to the original complaint was being distributed by the Industrial Mining and Guaranty Company." Note that the court does not find that Lawler and Wells became aware that *a* prospectus or that *some* prospectus was being distributed. We contend that there can be but one interpretation of the finding, not that Lawler and Wells heard of the circulation of a prospectus without knowing anything of what it contained, but *that they knew that this particular document attached to the complaint was in course of distribution*. The court does not find how Lawler and Wells personally learned that it was that par-

ticular prospectus, but the natural result of the finding must be that they had examined it, for how else could such personal, actual knowledge be obtained? *Clearly it was the intention of the court to state the ultimate and essential fact of knowledge without finding the probative facts as to how the knowledge was obtained.*

But we ask your honors to consider, in connection with findings 20 and 37, finding 43. This finding the learned counsel did not discuss. It reads:

"That the subscribers to the stock of the Seven Stars Gold Mining Company did not at the time of their individual subscriptions to, or at the time of their several payments for said stock, have any knowledge or notice *of any of the following matters:*

* * * * * * *

"(*d.*) That said defendants knew that *said prospectuses and maps* were being distributed."

Elsewhere (Find. 14, Trans., 318) the court finds that the map distributed was Exhibit C, attached to the original complaint, which appears at Transcript, page 24. That map as distributed contained the words "Map of the group of mines belonging to the Seven Stars Gold Mining Company," and the court expressly finds that appellees knew of the distribution of *said map.* Clearly the printed words identifying the mines are as much a part of the map as the printed lines delineating the various claims and their divisions. Here, then, is an express and unequivocal finding that Lawler and Wells knew of the circulation of the representation that the Seven Stars Gold Mining Company was the owner of these mines.

We submit that it is not a proper conclusion that the District Court intended to state that Lawler and Wells had simply heard of the circulation of *a* prospectus and *a* map, and of their contents they knew nothing. If such was the intention of the court, all doubt or ambiguity could easily have been removed by stating expressly that Lawler and Wells did not know of the contents. Clearly the court could not have ignorance of the contents in mind when it said that they knew of the circulation of *this prospectus* and *said map*.

In finding 16 the court explicitly states, in reference to the English prospectus, that Lawler and Wells had no "knowledge or notice of *its contents* until some time in the month of October, 1893."

If the court had in mind that Lawler and Wells were in ignorance of the contents of the American prospectus, would it not have made the same statement touching it?

It was asked by his honor, Justice White, during the course of argument, that if we requested the court to find that Lawler and Wells received copies of the prospectus and map, and that no such finding was made, is not that equivalent to a finding that they did not receive such prospectus or map? That inference we believe does not follow. The court found ultimate facts. The ultimate fact of *knowledge* is in finding 37. The receipt of copies was a mere probative fact tending to show the ultimate fact of knowledge, and the court therefore refused to insert the finding of receipt of copies.

That this thought was in the mind of the supreme court of Arizona is shown by its opinion (Transcript, 284). It says:

"That it is only the ultimate facts which the court is bound to find, and that this court will not take notice of a refusal to find the mere incidental facts which only amount to evidence from which the ultimate fact is to be obtained."

We asked the district court to include in its findings facts stated in submission of findings 9 to 19 (Transcript, 211 to 221), and it refused so to do, and the supreme court affirmed such refusal, saying they were "a number of evidentiary facts." Among such facts which we asked the court to incorporate in its findings were the following (Trans., 212): First, that Lawler was consulted freely by Warner and the men who worked for Warner and the clerks and officers of the Seven Stars Gold Mining Company in regard to the statements in the prospectus then being completed; second, completed prospectuses in the proof-sheets were read over to Lawler in the office of the Seven Stars Gold Mining Company, and he stated he was well pleased with them; third, that Lawler also saw the completed map made to accompany the prospectus; fourth, at the request of Lawler fifty copies of the American prospectus were sent to him at Prescott, Arizona; fifth, that the defendant Wells received a copy of the American prospectus in the course of its distribution; sixth, that Lawler had a copy of the prospectus in his possession in October, 1902, and also saw a verbatim copy in the New York *Herald*; seventh, that about October, 1892, Lawler read in a local paper at Prescott a criticism of Warner's scheme to float the property, and also a criticism in the New York *Herald*, and also read in the *Engineering and Mining Journal* of September, 1902, an article criticising Warner's method in floating the property; eighth, that copies of the American

prospectus were sent to the bank of Arizona, of which the defendant Wells was formerly the vice-president and director, and in which at this time he was a large stockholder and in the offices of which he had his desk, said copies being sent upon the following correspondence:

"PRESCOTT, ARIZONA, *Oct.* 11, '92.

"W. M. EARL, Esq.,

"*Treasurer, No.* 41 *Broadway, N. Y.*

"DEAR SIR: We acknowledge receipt of your telegram of the 10th inst. advising us of the fact that you had mailed us check for $5,000.

"We are paying all Hillside checks upon presentation, but have said nothing to Mr. Rickard about the guarantee you gave us.

"If he seems solicitous about the account this will explain.

"*Will you kindly send us a few of the prospectuses of the Seven Stars Mining Co.?*

"Yours very truly,

"W. E. HAZELTINE, *Cashier.*"

Hazeltine was the cashier of the Bank of Arizona mentioned in the agreements hereinbefore set out.

Earl, the treasurer of the Industrial Co., in reply wrote:

"With regard to your request for a few prospectuses of the Seven Stars Gold Mining Company, we expect some additional copies from the company within two or three days, when we will take pleasure in forwarding the same to you."

We also pointed out to the supreme court the testimony of the appellee Wells to the effect that he had received a copy of the American prospectus, map, and blank subscription form through the mails in the course of their distribution (submitted finding 47, Transcript, 252).

All the foregoing facts the district and supreme court refused to incorporate in the findings. Touching them the supreme court said (Trans., 290):

"The ninth to nineteenth findings, inclusive, request the finding *of a number of evidentiary facts, some of which were elsewhere found by the court,* some of which were adversely found on conflicting evidence, some of which were not shown by any evidence appearing in the record, *and many of which were not material but were simply incidental facts, which only amount to evidence from which the ultimate fact might be deduced.*"

We believe that these proceedings assist in the construction of finding 37, and show that it was the intention of the district court to there state the ultimate fact of knowledge by Lawler and Wells of what the prospectus represented, and it refused to find *the receipt of the prospectus and map* and *the examination of the prospectus and map* because they were probative facts.

As a further aid in the interpretation of these findings we deem it proper that the court consider the motion for a new trial drafted by the same counsel who drafted the findings which the district judge signed. (Motion for a new trial, Transcript, 168–190.)

It will be seen that in that motion for a new trial, which is a most careful and exhaustive review of the facts in the case (and no evidence was introduced after that motion was filed) while it is asserted that Lawler and Wells did not know of the contents of the English prospectus (Transcript, 178, A 2) it is nowhere denied that Lawler and Wells knew the contents of the American prospectus, but the claim is made throughout that motion that there is no false or fraud-

ulent statement contained in the American prospectus. It is said (Transcript, 184):

"Because the evidence shows that no one or more of the stockholders knew anything about the delivery of the Blauvelt maps, ore and smelter returns, or the visit of Lawler to New York, and the transactions there occurring, or the extensions of said Cowland contract, *or of the receipt by Lawler and Wells or the Bank of Arizona of any prospectus, or their knowledge of the distribution of said prospectus.*"

Our interpretation of finding 37 and the other findings to which we have referred as establishing the knowledge of Lawler and Wells of the character and contents of the prospectus and map is further sustained, we respectfully submit, by the conclusion of law attached to the findings of fact as made by the district court (Transcript, 274). That court concluded, as matter of law, that the purchasers of the capital stock of the Seven Stars Gold Mining Company were not authorized, from reading the prospectuses, maps, and blank applications distributed, to so construe the same as to believe or conclude therefrom that the legal title of the properties mentioned therein was vested in the Seven Stars Gold Mining Company, a conclusion from which we utterly dissent, but which goes to show the district judge considered the contents of the prospectus and map as a material consideration.

We beg to consider another inquiry by his honor Justice White while Mr. Scarritt was addressing the court. It was in respect to finding 19, the part thereof referred to being as follows:

"That the original Brodie map of which defendants' map, 'Exhibit A' in evidence is a true copy, had endorsed thereon the words, to wit: 'Plat of the Hillside and adjoining claims;'

and said quoted words were written upon the original draft of the distributed map, 'Exhibit C,' attached to the complaint; that afterwards, *without the knowledge of said Lawler, said quoted words were, before distribution*, changed on said map, 'Exhibit C,' to the words, to wit, 'Map of group of mines belonging to the Seven Star Gold Mining Company.'"

In the first place, it will be noted that this finding is limited to Lawler, and that it refers to the map and not to the prospectus, two separate and independent documents. In the second place, considering that finding in connection with the others, we believe that the court intended thereby to state that Lawler, while in New York, did not know of this change and did not know of it before distribution, and that it should not be read to limit the later express and explicit finding (finding 43, Transcript, 324), that Lawler knew of the distribution of the *said map* as it now appears in the record. The court found that before distribution the map had been changed (finding 19, Transcript, 320), and that the distributed map did contain the words, "Map of the group of mines belonging to the Seven Stars Gold Mining Company" (finding 14, Transcript, 318), and it is this map which was actually distributed in America and England (Find. 16) that is referred to in finding 43.

VI.

The dividend referred to by counsel which was paid appellants was simply the return to them of a part of their money (finding 60). Evidently it was a means of keeping up the appearance of prosperity to delude people into investing. If appellants now asked for the return of the entire

$254,892.77 which they paid for stock, instead of the amount of $160,152.21 (former Brief for Appellants, p. 99) actually received by Lawler and Wells from out of their funds, then the payment of this dividend might be a material fact.

Counsel's effort to show that appellants acted as stockholders for a considerable time of the Seven Stars Gold Mining Company is wholly unsupported by the record. There was never a stockholders' meeting. No reports were ever made. No information was ever given out except the prospectus. The only time appellants as stockholders ever assembled was the meeting in Jersey City to authorize this suit (Find. 60), and within a reasonable time after the fraud was discovered this suit was authorized and instituted. Laches was never suggested as a defense.

VII.

Counsel placed much stress upon the finding of Wiser's knowledge (Find. 39). Wiser is one stockholder out of five hundred (Find. 42). None of them could be affected or prejudiced by his knowledge. If so, all that would be necessary to protect such a fraud as is here shown would be to give notice to one purchaser of stock. If one stockholder is entitled to the estoppel, decree of title in company is proper.

Jones *vs.* Bolles, 9 Wall., 364.

In respect to the prayer for a money decree, the record shows exactly the amount paid by Wiser for stock.

The suggestion that the other appellants "were clerks or attorneys" of Wiser is not true. No one of them is asso-

ciated with Wiser in any capacity. If they are acquainted with him, their counsel do not know it. Wiser lives in Chicago (Trans., 57), and all appellants, save four, live in the East or in England (Trans., 57, 58) and are gentlemen of unquestioned integrity.

Language of the learned counsel seems to imply that it was something reprehensible for these buyers of stock to disturb Lawler and Wells in the enjoyment of the funds out of which they had been defrauded and to which Lawler and Wells have not the semblance of a *moral* right.

VIII.

In respect to the inquiry of his honor Justice White, touching the receipt of $50,000 of stock in the Seven Stars Gold Mining Company by Lawler and Wells as an evidence of their innocence, we respectfully submit that, taken in connection with the other findings, *it is more of an evidence of their confidence in the successful outcome of the scheme of Warner and of their purpose to get from it the largest possible returns for themselves.* Before this time the prospectus had been bringing splendid results, and Lawler and Wells had received over two hundred thousand dollars.

If Warner was willing to represent title to the public in order to get funds to obtain title, they, as the recipients of the funds, were willing to let him do so and take the risk of his hazardous scheme coming out all right in the end. The supposition that Lawler and Wells were in ignorance of the processes of Warner as late as May 11, after their visits to the offices of the company in New York, after two extensions had been applied for, after Warner had failed, after

the prospectus to their knowledge was in circulation for months, after the Seven Stars Gold Mining Company had itself paid them over $100,000, and been operating the mines for six months, and Lawler was about to become its manager, is, without reference to the effect of findings 20, 37, and 43, as it seems to us, utterly impossible.

IX.

Counsel's oral argument was chiefly a relation of facts, showing unrelinquished legal title of Lawler and Wells, all of which facts were concealed from appellants The argument as to constructive notice by registry of deeds is wholly inapplicable to this case, either on the theory of estoppel or of constructive trust, because appellants did not purchase into the title, and because, under all the authorities, those receiving a prospectus may implicitly rely upon its representations. See authorities in our former brief, pp. 63, 64, 91.

The doctrine of record notice can have no possible bearing on the case so far as it seeks a decree for the moneys out of which appellants were defrauded. No court has ever held that the presence of title on record excuses an express representation inconsistent with that record (see cases cited by counsel for appellee), and clearly, if appellants were defrauded by Warner, appellees cannot justify their retention of the fruits of that fraud by an appeal to their record title.

X.

Counsel refer to the representations in the prospectus as *vague phrases*. But they are not phrases, but complete sentences; and they are not vague, but positive, unqualified, direct. The affirmations that *the titles are unquestionable*, and *the company owns* this timber land, and that the *property belongs* to the Seven Stars Gold Mining Company, and that every purchaser of stock will obtain an interest therein and will share in all the earnings of the mines; the description of the property throughout as the property of the company whose stock was offered; and the total concealment of any adverse lien or title, show, we are compelled to believe, a preconceived and cherished design to mislead. But if your honors should believe, as counsel argue, that careful consideration and reflection ought to have led appellants to doubt these statements, we ask you to read the language of Lord Hirschill in Bloomenthall *vs.* Ford, 66 L. J. Rep. (Ch.), wherein he speaks of misrepresentations in certificates of stock, as follows:

"I cannot myself think that where an unequivocal statement is made by one party to another of a particular fact the party who made that statement can get rid of the estoppel which arises from another man's acting upon it by saying that if the person to whom he made the statement had reflected and thought all about it he would have come to see that it could not be true. Of course, if the person to whom the statement was made did not believe it, and did not act on the belief induced by it, no doubt there is no estoppel. But supposing he did believe it, and did act on the belief induced by it, then it seems to me you do not get rid of the estoppel by saying, 'If you had thought more about

it you would have seen it was not true.' The very person who makes a statement of that sort has put the other party off making further enquiry. He has produced on his mind the impression that further enquiry would be unnecessary or useless. Therefore, I confess I do not think that it is legitimate to speculate what is the conclusion at which a man would have arrived if he had put together—pieced together—all the considerations that might have occurred to a reflective mind cogitating on the whole subject, and then to say that because he would have come to the conclusion that the statement made to him, could not have been true, he is not entitled to act upon it as if it had been true, when in point of fact he did not enter into those considerations, but did believe it and did act upon it."

XI.

It was very many times suggested by the learned counsel for the appellees during his able argument that appellants were seeking to obtain title to a mine worth $450,000, for which only $231,000 had been paid. This skillful effort to keep in the foreground a supposed equity of appellees must prove ineffective, when it is considered that appellants specifically prayed that a decree be entered awarding them the moneys which they had paid for stock and which had been transmitted to Lawler and Wells, and if appellants are entitled to that relief the decree of dismissal must be reversed. The equity is all on the side of appellants. They received nothing for the $252,308.97 they paid. Lawler and Wells gave or suffered nothing for the $160,152.21 of that money which they received.

Contrast the escrow agreement and the prospectuses and the sober truth of Judge Truesdale's words appears:

"That these stockholders have been the innocent victims of an outrageous fraud, no one who has heard this testimony can for a moment doubt."

Lawler and Wells have in their hands the funds obtained by means of that fraud. A final determination of this controversy that they can keep such funds without *affirmative and clear showing* that they were received without any knowledge of the fraudulent means by which they were procured or of circumstances suggestive of inquiry to an ordinarily prudent and conscientious mind would stand without a precedent in equity.

Respectfully submitted.

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